IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

WEDNESDAY, THE 5TH JULY 2006 / 14TH ASHADHA,1928

CRL.A.No. 203 of 1999

CC.46/1996 of JUDL.MAGISTRATE OF FIRST CLASS-II, KOCHI

.....

APPELLANT:

A.K. KALADHARAN, C.C. XIV/1794,
KARUVELIPPADY, COCHIN

BY ADV. SRI.THOMAS CHAZHUKKARAN

RESPONDENTS:

T.M.ABDUL AZEEZ, C.C.XIV/1180-B, S.D.P.Y.
ROAD, PALLURUTHY, COCHIN

STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.PEEYUS A.KOTTAM
SRI.ASHIK K.MOHAMMED ALI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/07/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

CRL.A.203/1999

DATED THIS THE 5TH DAY OF JULY, 2006

JUDGMENT

The complainant, in C.C.No. 46/1996, on the file of the Judicial Magistrate of First Class-II, Kochi, is the appellant. He preferred a complaint, under Section 138 of the Negotiable Instruments Act, in short 'the Act', against the first respondent, accused, as Ext.P2 cheque issued by him, for an amount of Rs.35,000/-, was dishonoured and the accused did not settle the account, despite receipt of Ext.P5 notice, informing the dishonouring of the cheque. Hence the complaint was preferred.

2. The appellant examined two witnesses and marked eight documents. DW1 was examined and Ext.D1 was marked by the accused, respondent. The trial Court had dismissed the complaint on the grounds that Ext.P2 cheque was issued as a security, that the writings and signature of Ext.P2 cheque are on different hands and also that the details of the transaction had not been proved by

the appellant, complainant.

3. On going through the records, the dishonour of Ext.P2 cheque, issuing of Ext.P5 notice and receipt of the same, as could be seen from Ext.P6 postal acknowledgment card, and Ext.P7 reply notice are not disputed. Therefore, the points enumerated above, as grounds of dismissal by the trial Court have, alone to be discussed in this appeal.

4. The findings of the Court below that Ext.P2 cheque was issued as a security and therefore, dishonour of Ext.P2 does not attract Section 138 of the Act is not sustainable in view of the decision of the Supreme Court in I.C.D.S Limited v. Beena Shabeer(2002 (3) KLT 218 (SC)), where the Court held that the issuance of the cheque is not only for the discharge in whole or part of any debt, but the same includes “other liability” as well. The 'other liability' mentioned covers the issuance of the cheque as security. Therefore, the findings of the Court below on that point, is set aside. The above authority had been followed by this Court in Mohana Pai v.

Jabbar (2005 (1) KLT 118).

5. The Apex Court held that once a cheque is issued and dishonoured on presentation, because of the presumption, available in favour of the holder of the cheque in due course, under Section 118 as well as under Section 139 of the Act, unless the same is rebutted, the cheque has to be accepted as having validly issued in discharge of a debt, due to the holder of the cheque. (See K.N.Beena v. Muniyappan (AIR 2001 SC 2895). It is not necessary for the Court go through the passing of the consideration covering the cheque amount, unless presumption is rebutted. In this case, there is no evidence adduced to show that the presumption available under Sections 118 and 139 of the Act are rebutted. Hence I hold that the learned Magistrate went wrong in finding that the appellant had not established regarding the transaction and passing of the consideration in respect of Ext.P2 cheque amount. Therefore, the said finding is also not sustainable.

6. Yet another finding of the Court below is that

the writings in Ext.P2 cheque are of different hands. The apex Court held that even if a blank cheque is issued and the details therein, other than the signature of the executant, were filled up by the complainant or anyone else, unless the contends therein are rebutted, the same had to be accepted. The different hand writing or different colour of the ink is not a material alteration at all. (See Lillykutty v. Lawrance (2003 (3) KLT 721). Therefore, the findings of the learned Magistrate is unacceptable on the above principle as well.

7. When the entire evidence is thus appreciated, I hold that the appellant, complainant, had established the offence alleged against the accused, the first respondent, under Section 138 of the Act. Hence, I further hold that the first respondent, accused, as guilty and convict him, thereunder. Therefore, I set aside the impugned judgment of the trial Court as well as the acquittal of the accused therein.

8. Though the advocate is appearing on behalf of the first respondent, accused, he has to be heard on the

sentence, before imposing the same. For that limited purpose of hearing the first respondent, accused, on the question of sentence and for passing the sentence according to the law, I remand the case to the Judicial Magistrate of First Class-II, Kochi.

9. The parties shall appear before the Court below on 3.8.2006. The learned Magistrate, after hearing the accused, on the question of sentence, shall impose such sentence, as per the law.

10. If the parties are attempting to settle the matter, as per the provisions of the Act, the learned Magistrate shall give them an opportunity to do the same.

The appeal is allowed as above.

J.M.JAMES
JUDGE

mrcs